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Supreme Court of the United States

October Term, 1967

No. 363

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,
v.
SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.,
Respondents.

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC.,
and JACK O. GROSS,
Petitioners,
v.
SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
COUNTER-STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. The Federal Communications Commission Lacks Jurisdiction To Regulate CATV Systems	11
A. The Communications Act Does Not Give The Commission Jurisdiction To Regulate CATV Systems	13
B. The Control of Competition Is Beyond The Power of the Commission	35
II. The Commission Does Not Have The Authority To Issue A Restraining Order In Order to Maintain The *Status Quo* Pending The Outcome Of A Hearing	56
CONCLUSION	62
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases:	Page
Amerada Petroleum Corp. v. Federal Power Commission, 293 F. 2d 572 (C.C.A. 10th, 1961), *cert. denied*, 368 U.S. 976 (1962)	60, 61
Buckeye Cablevision, Inc. v. Federal Communications Commission, No. 20274, United States Court of Appeals for the District of Columbia Circuit (June 30, 1967)	31, 32
Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47 (1962), *reversed on other grounds*, 335 F. 2d 348 (C.C.A. 9th, 1964)	26
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 15 L. Ed. 2d 709 (1966)	36
Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958)	48
Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. denied*, 375 U.S. 951 (1963)	4
Easton Publishing Co. v. Federal Communications Commission, 85 U.S. App. D.C. 33, 175 F. 2d 344 (1949)	43-44
Federal Communications Commission v. RCA Communications, 346 U.S. 86, 97 L. Ed. 1470 (1953)	44
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 84 L. Ed. 869 (1940)	13, 40, 46, 48
Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company, 289 U.S. 266, 77 L. Ed. 1166 (1933)	12, 49
Fortnightly Corporation v. United Artists Television, Inc., Case No. 618, Oct. Term, 1967	52

Page

International Union, United Automobile, Aerospace & Agriculture Implement Workers, etc. v. Scofield, 382 U.S. 205, 15 L. Ed. 2d 272 (1965) 60

Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162 (1951) 36

National Broadcasting Company v. United States, 319 U.S. 190, 87 L. Ed. 1344 (1943) 44, 50

Pacific Far East Line v. Federal Maritime Board, 107 U.S. App. D. C. 155, 275 F. 2d 184 (1960), *cert. denied*, 363 U.S. 827, 4 L. Ed. 2d 1523 (1960) . . . 37, 38

Pan American World Airways v. United States, 371 U.S. 296, 9 L. Ed. 2d 325 (1963) 37

Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 123 U.S. App. D.C. 298, 359 F. 2d 282 (1966) 8, 14

R. A. Holman & Co., Inc. v. Securities and Exchange Commission, 112 U.S. App. D. C. 43, 299 F. 2d 127 *(1962), cert. denied*, 370 U.S. 911 (1962) 61

Regents of the University System of Georgia v. Carroll, 338 U.S. 586, 94 L. Ed. 363 (1950) 9, 19, 21, 32

Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 389 (1963) 37

Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 95 L. Ed. 239 (1951) 36

Trans World Airlines v. Hughes 332 F. 2d 602 (1964), *cert. granted*, 379 U.S. 912 (1964), *cert. dismissed*, 380 U.S. 248 (1965) 37

United States v. Radio Corp. of America, 358 U.S. 334, 3 L. Ed. 2d 354 (1959) 44

Weaver v. Jordan, 64 Cal. App. 2d 235, 411 P. 2d 289 (Calif. 1966), *cert. denied*, 385 U.S. 844, 17 L. Ed. 2d 75 (1966) 55

Administrative Decisions: Page

CATV and TV Repeater Services,
26 F.C.C. 403, 18 Pike & Fischer 1573 (1959) 49

First Report and Order in Dockets No. 14895 and 15233,
(30 Fed. Reg. 6038; 38 F.C.C. 683; 4 Pike &
Fischer, R.R. 2d 1725) 4

Iredell Broadcasting Co. (WDBM),
23 F.C.C. 79, 13 Pike & Fischer R.R. 996 (1957) 47

Kaiser Hawaiian Village Radio, Inc.,
22 F.C.C. 751, 13 Pike & Fischer R.R. 849 (1957) . . . 47

Midwest Television, Inc.,
11 Pike & Fischer, R.R. 2d 273 8

Midwest Television, Inc. (KFMB-TV),
5 F.C.C. 2d 686, 8 Pike & Fischer,
R.R. 2d 1075 (1966) 35

Notice of Inquiry and Proposed Rule-Making in
Docket No. 15971, (30 F.R. 6078; 4 Pike & Fischer
R.R. 2d 1679) 4

Presque Isle Broadcasting Co.,
8 F.C.C. 3 (1940) 46

Dissenting Opinion of Commissioner Lee Loevinger on
Reconsideration of CATV Rules, Docket Nos. 14895,
15233 and 15971, 8 Pike & Fischer, R.R. 2d 1698
(1967) 32

Second Report and Order in Dockets 14895, 15233 and
15791, (31 F.R. 4540; 2 F.C.C. 2d 725; 6 Pike & Fischer
R.R. 2d 1717) 4

Southeastern Enterprises (WCLE),
22 F.C.C. 605 13 Pike & Fischer, R.R. 139 (1957) . . . 47

The Voice of Cullman,
14 F.C.C. 770, 6 Pike & Fischer, R.R. 164 (1950) . . . 47

Miscellaneous:

	Page
Broadcasting, January 29, 1968	52
Evaluation by the Federal Communications Commission, An Unconstitutional Abridgment of Free Speech (1951) 40 Georgetown L.J. 1	55
Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong. 1st Sess. (1947)	41-42
H.R. Rep. No. 1850, 73d Cong. 2d Sess. (1934)	16
Conference Report on Communications Act Amendments, H.R. Rep. No. 2426, 82d Cong. 2d Sess. (1952)	33
H.R. Rep. No. 1559, 87th Cong. 2d Sess. (1962)	23
H.R. Rep. No. 281, 88th Cong. 1st Sess. (1963)	24
H.R. Rep. No. 1635, 89th Cong. 2d Sess. (1966)	27
Refusal of Radio and Television Licenses on Economic Grounds (1960) 46 Va. L. Rev. 1391	55
S. Rep. No. 781, 73d Cong. 2d Sess. (1934)	15
S. Rep. No. 1526, 87th Cong. 2d Sess. (1962)	23

Constitution and Statutes:

United States Constitution, First Amendment	12
Communications Act of 1934, 48 STAT. 1064, as amended, 47 U.S.C. §151 *et seq.* (1964):	
Section 1, 47 U.S.C. §151	22, 34
Section 2(a), 47 U.S.C. §152(a)	9, 13, 14, 24, 25
Section 3(a), 47 U.S.C. §153(a)	24, 25
Section 4(i), 47 U.S.C. §154(i)	7, 10, 17, 18, 57, 58, 60

	Page
Section 301, 47 U.S.C. §301	16
Section 303(f), 47 U.S.C. §303(f)	17, 18, 25
Section 303(h), 47 U.S.C. §303(f)	18, 21
Section 303(r), 47 U.S.C. §303(r)	7, 10, 17, 18, 19, 25, 33, 57
Section 303(s), 47 U.S.C. §303(s)	16, 18, 23, 25
Section 307(b), 47 U.S.C. §307(b)	17, 18, 21, 22, 25, 41, 42
Section 312(b), 47 U.S.C. §312(b)	18, 33, 57, 58
Section 309, 47 U.S.C. §309	59
Section 312(a), 47 U.S.C. §312(a)	59
Section 401, 47 U.S.C. §401	59
Section 501, 47 U.S.C. § 501	59
Section 502, 47 U.S.C. §502	59
Federal Aviation Act of 1958, 72 STAT. 737, as amended, 49 U.S.C. §§ 1301 *et seq.*	37
Merchant Marine Act of 1936, 49 STAT. 1985, as amended, 46 U.S.C. §§ *1101, et seq.*	37
Natural Gas Act, 52 STAT. 821, as amended, 15 U.S.C.A. §717 (1963)	60
Section 16, 15 U.S.C.A. § 717o	60
Securities Act of 1933, 48 STAT. 75, as amended, 15 U.S.C.A. §77a, *et seq.* (1963)	61
Section 3(b), 15 U.S.C.A. §77c(b)	61
Security Exchange Act of 1934, 48 STAT. 881, as amended, 15 U.S.C. §§78a, *et seq.*	37

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BRIEF FOR RESPONDENTS MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (A. 184-193)[1] is reported at 378 F. 2d 118. The

1 "A." refers to the printed appendix filed in this Court under Rule 36(1).

Memorandum Opinion and Order of the Federal Communications Commission (A. 146-179) is reported at 4 FCC 2d 612, 8 Pike & Fischer, R.R. 2d 278 (1966).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 28, 1967 (A. 194). A petition for a writ of certiorari was filed by the United States on July 13, 1967 (Case No. 363) and by Midwest Television *et al.* (Case No. 428) on July 27, 1967. Certiorari was granted in both cases on October 23, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1964) and 28 U.S.C.A. §2350 (1966 Supp.).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has jurisdiction to regulate non-microwave community antenna television (CATV) systems.

2. If it has, whether in the exercise of such jurisdiction the Commission has power to issue an interim order maintaining the *status quo* pending a hearing to determine the impact on local "free" television of distribution by a CATV system of television signals from other areas of the country.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(e), 4(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b) of The Communications

Act of 1934, 48 STAT. 1064, as amended, 47 U.S.C.A. §§151, 152(a), 153(a), 153(e), 154(i), 301, 303(f), 303(h), 303(r), 303(s), 307(b), and 312(b), are set forth in the Appendix to Petitioner FCC's Brief, pp. 57-61. Sections 309(a), 309(e), 312(a), 401, 501, and 502 of the Act, 48 Stat. 1064, as amended, 47 U.S.C.A. §§309, 312(a), 401, 501, and 502 are set forth in the Appendix to this Brief.

COUNTER-STATEMENT OF THE CASE

Respondents, Mission Cable TV, Inc., and Pacific Video Cable Co., are the owners of community antenna television systems (CATV)[2] in the San Diego, California, area. Respondent, Trans-Video Corp., is the majority owner of Mission Cable TV, Inc., and the sole owner of Pacific Video Cable Co. In addition, Trans-Video Corp. is the operator of the systems owned by Mission and Pacific.[3] Mission and Pacific began operating prior to February 15, 1966, under authority of franchises issued by the Cities of San Diego, Chula Vista, La Mesa, El Cajon and the County of San Diego.

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[2] A CATV system is an enterprise which receives television signals transmitted by television broadcast stations (either directly off-the-air or by means of a radio microwave relay), amplifies these signals and distributes them through a system of cables to subscribers who pay a charge for this service. In this case, Petitioners' systems use off-the-air pickups only.

[3] Trans-Video Corporation, successor to Trans-Video Corp., is now the sole owner of Mission Cable TV, Inc. and Pacific Video Cable Co. This change occurred subsequent to the date of the decision in the lower court but does not affect the standing of the parties or the merits of the case.

On April 23, 1965, the Commission issued its First Report and Order in Dockets No. 14895 and 15233 (30 F.R. 6038; 38 F.C.C. 683; 4 Pike & Fischer, R.R. 2d 1725) in which it adopted rules covering the operations of common-carrier microwave stations to relay signals to CATV systems. These rules, in reality, apply to and control the operation of CATV systems which receive signals via microwave.[4] At the same time, the Commission issued a Notice of Inquiry and Proposed Rule-Making in Docket No. 15971 (30 F.R. 6078; 4 Pike & Fischer, R.R. 2d 1679) concerning the adoption of rules to control the operation of all CATV systems.

On February 15, 1966, the Commission issued a press release announcing that it planned to adopt new rules to regulate all CATV systems. These rules were not adopted until March 4, 1966, and were not released to the public until March 8, 1966. They were published in the Federal Register on March 17, 1966, as the *Second Report and Order* in Dockets 14895, 15233 and 15791 (31 F.R. 4540; 2 F.C.C. 2d 725; 6 Pike & Fischer, R.R. 2d 1717; A. 1-96). In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which received signals directly off-the-air from television broadcast stations. In essence, the new rules are purportedly designed to protect and foster the development of local UHF television broadcast service. The Commission was concerned that the increased variety of signals available on CATV systems might reduce the available audience and revenues for local television broadcast stations by "fragmentation" of audience. To prevent this purported evil, the new rules provide that CATV systems

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[4] See, *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. denied*, 375 U.S. 951 (1963).

must carry local stations and nearby stations in accordance with a system of priorities based upon signal strength. They also provide that a local television station may prevent the CATV system from carrying, on the same day, the signal of a non-local station which duplicates the programs of the local station. In addition, the new rules provide that no CATV system in the top 100 markets, as defined by ARB,[5] may extend any "distant signal" beyond the Grade B contour of the originating station without Commission approval after a hearing. Finally, the rules provide that the Commission may impose other limitations upon CATV systems if required to protect the "public interest."

The rule prohibiting carriage of distant signals was made effective on February 15, 1966 (the date of a press release), despite the fact that these rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. CATV systems in operation and delivering distant signals on February 15, 1966, were accorded "grandfather" rights and were permitted to continue carriage of distant signals.

On March 17, 1966, Petitioner, Midwest Television, Inc., licensee of VHF television station KFMB-TV, San Diego, California, filed a "Petition for Immediate Temporary and/or Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area," naming Respondents, among others, as respondents. A supplement to the petition was filed on April 4, 1966.

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[5] The American Research Bureau is a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits.

On April 18, 1966, Respondents filed an opposition to the Midwest petitions. Midwest, in turn, filed a reply on April 25, 1966, to the Opposition to the Motion for Temporary Relief, and on May 3, 1966, filed a reply to the Opposition for Permanent Relief. Various pleadings were filed by other respondents in the proceeding.

On May 31, 1966, Respondents filed a "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV systems Carrying Signals of Los Angeles Stations into the San Diego Area' " and, on July 25, 1966, the Commission released the Memorandum Opinion and Order which was reviewed by the court below (A. 146-179). In it, the Commission concedes that Respondents' CATV systems are not operating in violation of any of the new CATV rules. It then concluded that, in accordance with the statement in the Second Report and Order, the San Diego situation was a special case which the Commission would investigate and consider on an *ad hoc* basis to determine if any new and additional requirement or limitation should be placed upon CATV systems operating under these circumstances (A. 164-165). It then designated the matter for hearing in an adversary proceeding on a series of broad issues which, in fact, constituted a further rule-making proceeding, to determine the extent of CATV penetration in San Diego, and the effect of CATV operations on local television stations in that market (A. 172-173).

The Commission then went on to determine the nature of the temporary relief to be afforded to Petitioner, Midwest Television, Inc. It ruled that pending final disposition of this proceeding, it would order Respondent Mission to confine delivery ". . . of the Los Angeles signals carried on its systems to subscribers within those areas where Mission . . . was

operating on February 15 , 1966." In addition, it ruled that Mission could continue its present service to persons who began receiving service and to those who signed subscription requests between the date of February 15, 1966, and the date of the Order. The Commission pointed out that Respondents could continue to construct lines and add new subscribers within these franchised areas ". . . *so long as the expansion is confined to the carriage of the San Diego-Tijuana signals.*" (Emphasis supplied) (A. 170-172, 174). This language clearly demonstrates that the stay was in stark reality a final government sanction prohibiting the dissemination of certain television programs to the public of the San Diego area, for an indefinite period of time.

On August 10, 1966, Respondents filed a Petition for Review and a Petition for Stay Pendente Lite in the court below. After hearing, the court, on August 23, 1966, issued a partial stay of the Commission's Order, allowing Respondents to add new subscribers to their trunk and feeder lines in existence on August 23, 1966.

On April 28, 1967, the court below issued the opinion now under review by this Court. The Court of Appeals concluded and held that Sections 4(i) and 303(r) of The Communications Act of 1934, as amended,[6] the sources of power relied on by the Commission, do not authorize the Commission to temporarily restrain or limit Respondents' delivery of Los Angeles television stations to their customers in the San Diego area.

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[6] 48 STAT. 1066, 47 U.S.C.A. §154(i) (1962); 50 STAT. 191, 47 U.S.C.A. 303(r) (1962). In the paragraphs that follow, references to sections of The Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other sections are identically numbered in both the Act and the Code.

Beginning in December of 1966, The Commission's evidentiary hearing was held and on October 3, 1967, the Examiner released his Initial Decision which announced, among others, his conclusions that there ". . . is no evidence that CATV produced competition to date has any effect whatsoever on the service offered the public by the San Diego television stations . . ."; that ". . . CATV expansion will have no material effect on the operation of San Diego's network-affiliated stations . . ."; that its probable effect on ". . . prospective and proposed UHF stations is unproven . . ."; and that ". . . there is no basis for the imposition of any restrictions on the present or future operation of CATV systems in the San Diego market." (*Midwest Television, Inc.*, 11 Pike & Fischer, R.R. 2d 273, 303, 304).

SUMMARY OF ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE CATV SYSTEMS

A. The Commission's authority is precisely defined and clearly limited by The Communications Act of 1934, as amended, and unless Title II or Title III of that Act provides the necessary authority, it does not exist. The Commission has conceded that CATV systems should not be regulated as common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 123 U.S. App. D.C. 298, 359 F. 2d 282 (1966). On the other hand, except for special and specific statutory

authorizations, all of the provisions of Title III of The Communications Act have to do with, or are related to, the licensing of radio stations. Thus, insofar as non-common carrier communication functions are concerned, the Commission (unless otherwise specifically authorized by statute) is authorized only to license radio stations, and its rule making activities must be related to and based on this licensing authority. See, *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 94 L. Ed. 363 (1950). While Section 2(a) of The Communications Act applies ". . . to all interstate . . . communication by wire or radio . . .", this has no bearing on the Commission's authority to regulate CATV systems, even though such systems are determined to be "interstate communication," since none of the Act's provisions cover such systems. CATV systems do not require licenses within the meaning of Title III of The Communications Act, and they are not common carriers within the meaning of Title II. Accordingly, any rules adopted by the Commission looking to the regulation of such systems are inconsistent with the Act and, therefore, unlawful.

B. The Commission does not have jurisdiction to regulate non-microwave CATV systems since the sole purpose of these new rules – elimination of competition – is beyond the powers conferred upon the Commission by Congress. The basic economic policy of the United States is to promote free and competitive business enterprise. This policy, expressed in the anti-trust laws, can only be modified or eliminated by specific exemptions conferred by Congress. Congress did grant the Commission power to consider economic competition under Title II of The Communications Act insofar as the regulation of common carriers is

concerned. However, no such exemption was granted under Title III which is the basis for the present rules. It is clear that the decision of this Court in *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 84 L. Ed. 869 (1940), does not hold that this power has been conferred upon the Commission. *Dictum* in that opinion has been relied on by the lower courts in holding that the Commission has the power to consider the effect of competition in licensing broadcast stations under the criterion "public interest, convenience, and necessity". It is submitted that this Court must clarify this *dictum* and state that its decision in *Sanders* holds that the Commission has no power to regulate competition from other legitimate business simply to protect UHF television stations.

II.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE A RESTRAINING ORDER IN ORDER TO MAINTAIN THE *STATUS QUO* PENDING THE OUTCOME OF A HEARING

Sections 4(i) and 303(r) of The Communications Act do not empower the Commission to issue an interim restraining order maintaining the *status quo* pending a hearing to determine the impact on local "free" television of CATV distributed television signals. The court below correctly concluded that if those sections did authorize such orders, ". . . the authority of Section 312 to issue cease and desist orders would be meaningless or repetitive." Petitioners' theory to the contrary would accord the Commission greater enforcement power with respect to broad, undefined responsibilities than it has with respect to its specifically defined

responsibilities. The only authorities relied on by Petitioners in support of their position are cases involving actions of two other government agencies, the Security and Exchange Commission and the Federal Power Commission. Those agencies, however, are governed by different statutes and their powers, functions, and responsibilities are quite different than the powers, functions and responsibilities of the Federal Communications Commission. The cases relied on, therefore, do not evidence the intent of Congress with respect to the power of the Commission.

Moreover, the facts presented in these cases are different. They do not stand for the proposition that the Commission has authority to summarily stay the legal activities of Respondents pending a hearing to determine whether a permanent stay should issue.

ARGUMENT

I.

THE FEDERAL COMMUNICATIONS COMMISSION LACKS JURISDICTION TO REGULATE CATV SYSTEMS

Introduction

The paramount question presented by this case is whether present legislation, *i.e.*, The Communications Act of 1934, as amended, 66 STAT. 1064 *et seq.*, 47 U.S.C.A. §§151 *et seq.* (1962), authorizes the Federal Communications Commission to regulate community antenna television, a business which does not engage in a common carrier

communications service, does not use the radio spectrum, and with respect to which there are no special statutory provisions. Petitioners concede that there are no particular statutory provisions covering CATV but contend that in enacting The Communications Act, and amendments thereto, Congress has delegated to the Commission powers that are so flexible, so comprehensive, and so expansive that particular legislation is not necessary. In essence, Petitioners argue that the Federal Communications Commission has the power and authority to take whatever action it deems appropriate in the interest of promoting and realizing ". . . the vast potentialities of radio."

Such a claim of power raises questions which go to the very roots of our system of government. It challenges the basic propriety of the First Amendment to the Constitution of the United States, the need for definitive legislation by Congress in any field regulated by an administrative agency, and the validity of past decisions of this Court. Respondents submit that present legislation does not give the Federal Communications Commission such broad, flexible, comprehensive and expansive powers. What Petitioners are asking is that this Court give the Commission such powers.

This Court, however, has already determined that present legislation cannot ". . . be interpreted as setting up a standard so indefinite as to confer an unlimited power. . ." even with respect to radio regulation. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285, 77 L. Ed. 1166, 1178 (1933). Rather it has decreed that the "public convenience, interest or necessity" clauses of The Communications Act, the Act's "touchstone" (and obviously basic to the Commission's assertion of jurisdiction over CATV) ". . . is given meaning and contour by the other provisions of the statute and the subject matter with which it

deals." *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 473, 84 L. Ed. 869, 872 (1940).

It is submitted that such power as the Federal Communications Commission possesses must be found spelled out within the four corners of The Communications Act. The Commission has not been given carte blanche authority by the Congress ". . . to promote and realize the vast potentialities of radio. . ." in any manner it sees fit. The means and extent of its promotional efforts are defined and limited by the statute and the power granted therein falls far short of authority to regulate CATV.

A. The Communications Act Does Not Give the Commission Jurisdiction To Regulate CATV Systems

While Petitioners repeatedly refer to the "comprehensive," "sweeping," "flexible" and "expansive" statutory power and authority of the Federal Communications Commission in arguing that The Communications Act of 1934, as amended, confers jurisdiction on the Commission to regulate CATV systems, there is no doubt but that basic reliance is placed on Section 2(a) which they contend subjects CATV to certain other general regulatory provisions contained in the Act. Accordingly, an analysis of Section 2(a) and other pertinent sections of The Communications Act of 1934 is required.

Under The Communications Act, the Federal Communications Commission has two principal and separate functions. On the one hand, it is a regulator of a public utility type of activity (Title II), and, on the other, it is an agency that licenses radio stations (Title III). Here we need be concerned only with the latter, for the Commission has held that CATV

systems are not common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission, supra.*

While conceding that common carrier regulation is not involved, Petitioners nevertheless contend that the Commission has the required authority to adopt the CATV rules, and thus to determine whether and to what extent citizens of this country may engage in the perfectly legal business of operating a CATV system. It has such authority, Petitioners say, because Section 2(a) of The Communications Act provides that the provisions of the Act ". . . shall apply to all interstate and foreign communication by wire or radio . . ." and CATV systems engage in "communication by wire". The simple fact of the matter, however, is that there are *no provisions of the Act* that even remotely purport to have anything to do with the control and regulation of wired communication systems that are not common carriers within the meaning of Title II of the Act.

No study or analysis of the legislative history of The Communications Act of 1934, however twisted or tortured, can lead to a conclusion that the Congress, when it adopted the Act, intended anything other than to place the responsibility for administering two separate and distinct statutory laws under one governing body – the Federal Communications Commission. True, those laws – the Interstate Commerce Act, insofar as it pertained to common carrier communications by telegraph, telephone and cable companies, and the Federal Radio Act – were amended in the process, but there were no amendments which contemplated new areas of jurisdiction and responsibility for the Federal Government.

Thus, as the Senate Committee explained in its report on the then proposed Communications Act of 1934, the legislation contains ". . . many provisions . . . copied

verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business . . .". The Report also points out that, while in some paragraphs the language is changed, the ". . . variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective." S. Rep. No. 781, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:221, 10:222).[7]

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[7] The House also made it clear that no changes in the substance of previous legislation were contemplated by the Communications Act of 1934. Its Report explained the new legislation as follows:

> "The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations . . . .
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> * * *
>
> "It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass adequate

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Legislative history thus establishes that the primary purpose of The Communications Act of 1934 was simply to provide for the regulation of common carriers and for the licensing of radio stations by the same agency. Congress did not intend – and the Act does not essay – to create new areas of federally regulated activity.

Moreover, the new act made no changes of substance with respect to the Federal Government's responsibility in the radio field. While the Commission can and does exercise some measure of control over the operations and activities of the radio stations it licenses, such control stems from the licensing function, and the basis for control and regulation is the license. The statutory prohibition as provided in Section 301 of the Act is simply that the use or operation of any apparatus *for the transmission of energy or communications or signals by radio* is unlawful unless such use or operation is first licensed by the Commission. Absent such a license, a user or operator of radio apparatus is subject to fine and imprisonment.

Title III of the Act is entitled "Provisions Relating to Radio" and each and every section of Title III in fact does relate to radio. Furthermore, with a few exceptions, *i.e.*, Section 303(s), all of the provisions of Title III relate only to the

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regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong., 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:243-10:244).

radio *transmission* function. Title III of the Act does not purport to be concerned with *the reception* of radio signals and, until the adoption of the rules at issue here, the Commission has never asserted that reception of radio signals or dissemination of information by wire (except by a carrier subject to regulation under Title II of the Act) was any of its business or concern.

The Act has not been changed and a radio station, the apparatus with which the Commission is concerned, is still only a station "equipped to engage in *radio* communication or *radio* transmission of energy." A CATV system is not equipped to engage in *radio* communication or *radio* transmission of energy. It is equipped only to engage in "wire communication" and, therefore, subject to regulation only if it functions as a common carrier within the meaning of Title II of the Act.

In asserting jurisdiction over CATV systems, the Commission relied only on the general rule-making authority granted it by such Sections as 4(i) and 303(f) and (r) which, the Commission contended, ". . . includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of Section 307(b) by CATV – an 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and (3))." See, *Second Report and Order*, Dockets 14895, 15233 and 15971, *supra*, at 729, 6 Pike & Fischer, R.R. 2d at 1727 (A. 5). The Government, at page 29 of its brief, restates this basis of authority as follows:

> ". . . CATV constitutes interstate communication by wire (47 U.S.C. 152(a), 153(e)) since the systems physically intercept and extend television signals. By so doing, they directly affect and threaten

> to disrupt the allocation plan for off-the-air television service established by the Commission under the Act (47 U.S.C. 303(h) and (s), 307(b)). CATV is therefore subject to the Commission's general regulatory powers (47 U.S.C. 154(i), 303(f) and (r), 312(b))."[8]

The point of Petitioners' argument in support of the Commission's jurisdiction, therefore, is that the Commission may adopt rules (and take other actions) regulating wired CATV systems by authority of Sections 4(i) and 303(f) and (r) of The Communications Act for the purpose of implementing Sections 303(h) and (s) and 307(b).[9] The short answer, of course, is that Sections 4(i) and 303(f) and (r) specifically require that the Commission's actions, *i.e.*, regulations adopted, orders issued, etc., *be consistent with the Act or law.* Petitioners thus beg the question.

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[8] The pertinency of Section 312(b) in terms of its relationship to Sections 154(i) and 303(f) and (r) completely escapes Respondents. Section 312(b) merely provides for an administrative sanction, *i.e.*, authorizes the Commission to issue cease and desist orders. It is meaningful with respect to the Commission's authority, or lack of authority, to issue interim restraining orders but it has no bearing, and Petitioners make no effort to show that it does have a bearing, on the basic question of the Commission's authority to regulate CATV.

[9] The pertinency of Section 303(s), insofar as it has a bearing on the point for which it is cited by Petitioners, also escapes Respondents. Section 303(s) simply requires that only so-called "all-channel" (VHF and UHF) television receiving sets be shipped in interstate commerce and the CATV rules obviously have nothing to do with that problem. Moreover, the Commission's authority with respect to Section 303(s) was specifically given it by a separately adopted amendment to the Act. Its proper relationship to the question posed before this Court is explained *infra* at p. 23.

Respondents concede that the Commission has, and must have, authority to adopt rules and take actions ". . . not inconsistent with the Act or law". The key, however, is that its rules and actions *must be consistent with the Act or law* and the particular question for decision is whether the CATV rules are consistent with the authority granted the Commission by law, *i.e.*, by The Communications Act of 1934, as amended. Respondents submit that the court below correctly decided this question in the negative.

As this Court has explained with respect to the extent of the Commission's authority under the so-called general rule-making provisions of the Act, such Sections as 303(r) must be interpreted and applied in connection with the Commission's power to license radio stations.[10] *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 600, 94 L. Ed. 363, 374 (1950).[11] Only when so limited and related are Title III

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[10] Section 303(f) must be similarly applied although Section 4(i) could also be applied in connection with the Commission's power to regulate communications common carriers.

[11] In *Regents of the University System of Georgia v. Carroll*, *supra*, at 597-599, 94 L. Ed. at 373-374, the Court also stated as follows (footnotes omitted):

> ". . . As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. 47 USCA §307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission

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rules and Title III actions of the Federal Communications Commission valid and lawful.

The Commission's CATV rules are not based on the Commission's licensing power, and there are no other powers provided by law which support them. In particular, there are no provisions in The Communications Act having to do with the regulation of wired communications systems other than those governing common carriers. Otherwise, insofar as material here, the Commission's authority – and all pertinent provisions of the Act – have to do with the licensing of radio stations. The CATV regulations here involved obviously are not consistent either with the provisions of the Act (or any other law) concerning common carrier regulation or with those concerning the licensing of radio transmission. Accordingly, the court below properly determined the Commission's lack of jurisdiction.

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> may grant a license to a competittor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 84 L. Ed. 869, 874, 60 S. Ct. 693; National Broadcasting Co. v. United States, 319 U.S. 190, 218, 227, 87 L. Ed. 1344, 1363, 1368, 63 S. Ct. 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions."

As pointed out above, the Commission (and Petitioners) would have it appear that the CATV rules, and the regulation contemplated thereby, are necessary for the purpose of carrying out the provisions of Section 307(b) of the Act.[12] Section 307(b), however, is specifically limited to the licensing and regulation of radio stations, and, in view of *Regents of the University System of Georgia v. Carroll, supra,* cannot have a bearing on the Commission's jurisdiction over wired CATV systems. Moreover, Section 307(b) has nothing to do with the establishment of any communications policy – federally dictated or otherwise. It does not assure any person, or any community, or any group of persons, access to any television signals or programs. It merely directs the Commission, when it considers ". . . applications for licenses, and modifications and renewals thereof,. . . " and ". . . *when and insofar as there is a demand for . . .* " the facilities applied for, to ". . . make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." (Emphasis supplied).

CATV systems have no need for radio frequencies; they are not making a demand for them; and they do not apply to the Federal Communications Commission for anything. It is submitted, therefore, that Section 307(b) has nothing to do with the operation of a perfectly lawful and locally authorized CATV business, the only purpose of which is to perfect the

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[12] Section 303(h) which authorizes the Commission ". . . to establish areas and zones to be served by any station . . . " is also referred to by Petitioners, but, insofar as the question presented is concerned, that Section is in the same category as Section 307(b) and adds no validity to Petitioners' argument.

ability of the public to receive the "radio communications" that The Communications Act specifically indicates the public is entitled to receive.

Respondents have no quarrel with the Commission's objective of allocating and assigning broadcast frequencies with a view to ". . . making available, *so far as possible,* to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service." (Emphasis supplied) This, in fact, is the responsibility Congress has assigned to the Commission under Section 1 of The Communications Act. On the other hand, Respondents do challenge the legality of the Commission's efforts to foreclose CATV service to those "people of the United States" who at the very least must feel that such service adds to the *efficiency* of their television "service". Some of those people must also believe that CATV brings them somewhat closer to Nation-wide, and even world-wide, communication than they would be if left solely to the offerings of stations which they, as individuals, can receive directly off-the-air.

If Title III of the Act gives the Commission the power and authority to control non-common carrier CATV systems so that those systems do not frustrate Section 307(b) and the allocation policies adopted by the Commission with a view to implementing the objectives of that Section, then the Commission also has the power and authority to adopt rules and regulations requiring television viewers to tune their sets only to their home community stations. Section 307(b) and the Commission's allocation policies are just as likely to be frustrated by tall receiving antennas, individually owned and maintained, as by CATV connections. Obviously, however, The Communications Act in general, and Section 307(b) in particular, do not authorize the Commission to dictate which stations viewers may watch on their sets.

If, in fact, The Communications Act does empower the Commission to adopt rules and take actions governing CATV systems in order that Section 307(b) not be frustrated, then the Act, prior to July 10, 1962 (when Section 303(s) was added) also empowered the Commission to adopt any rules and to take any actions necessary to insure that all television receiving sets shipped in interstate commerce be capable of receiving all frequencies (VHF and UHF) allocated by the Commission to television broadcasting, *and it now empowers the Commission to foreclose the sale of any television receiving set capable of receiving television station signals which, in its unchallengeable discretion, the Federal Communications Commission believes should not be received in any particular community.*

There is no legally significant difference between foreclosing or limiting the use of CATV apparatus and foreclosing or limiting the use of individual receiving sets; yet in 1962, the Commission stated that it needed legislation to accomplish the latter,[13] while it now insists it needs no legislation to accomplish the former. If this Court finds that the Commission has jurisdiction over CATV systems, it will judicially sanction the power and authority of the Commission to dictate the receiving capacity of every television set used in this country.[14]

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[13] See, H.R. Rep. No. 1559, 87th Cong., 2d Sess. (1962), and S. Rep. No. 1526, 87th Cong., 2d Sess. (1962), to accompany H.R. 8031 (1 Pike & Fischer, R.R. 10:481-10:518).

[14] The effect of such a determination by this Court would also grant to the Commission the power and authority to regulate and control the operations, activities and programs of the radio and television networks – the major sources of both news and entertainment for radio and television stations – a power which the Federal

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Furthermore, the two methods of reception, one via CATV wire connections and the other via home receiving antennas and related transmission lines, cannot be legally distinguished on the basis of Sections 2(a) and 3(a) of the Act. Section 2(a) merely provides that the *provisions* of the Act shall apply to all interstate and foreign communications by wire or radio, *i.e.*, the provisions of Title II shall apply to common carriers (whether engaged in wire or radio communications), and the provisions of Title III shall apply to the licensing of *radio* stations.

Section 3(a) on the other hand (as well as Section 3(b)), is merely concerned with defining "communication" to insure that all phases of common carrier activity – not merely the transmission function – are subject to regulation under the provisions of Title II. In this connection, it will be noted that the definitions of "wire communication" and "radio communication" in Sections 3(a) and (b) include ". . . all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications)

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14 (continued)

Communications Commission has repeatedly advised the Congress it does not have under present legislation. See, *Television Network Program Procurement*, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963). If CATV systems are (as Petitioners say they are) subject to Commission jurisdiction and regulation because they ". . . physically intercept and extend television signals . . . " then the networks are also subject to the Commission's jurisdiction because they "physically" initiate and contract for the distribution of the signals that are later intercepted and extended. Petitioners' theory of Commission jurisdiction over CATV systems would also subject the private wired communications systems of the press services, railroads and other industrial users to Commission regulation and control as explained in more detail in the brief of Respondent Southwestern Cable Co.

incidental to . . . transmission." The basic purpose of including in both Sections 3(a) and (b) such "services" as the "receipt, forwarding, and delivery" of communications as well as "instrumentalities, facilities, apparatus", incidental to transmission was to assure that all phases of point-to-point wire and radio communications would be subject to the provisions of Title II of the Act. By their very terms, these sections have no meaning insofar as the licensing and related provisions of Title III of the Act are concerned. If Congress had intended to include the receipt, forwarding and delivery of radio signals *per se* within the meaning of the Commission's non-common carrier licensing responsibilities, it would have done so specifically.

It follows, therefore, that Sections 2(a) and 3(a) of the Act cannot be used as a bridge whereby the provisions of Sections 303(f), (r) and (s), 307(b), or any other section of Title III, are made applicable to the dissemination of information (writing, signs, signals, pictures, sounds, etc.) by wire, cable or other like connections or to the reception of such information so transmitted. These provisions deal specifically with "radio stations" and the transmission of radio energy, and they are applicable only to radio stations. Since CATV systems are not radio stations, they cannot be controlled or regulated in any way under Title III of the Act, and the Commission's efforts to so control and regulate them are, therefore, unlawful.

If Petitioners' theory of the jurisdiction of the Federal Communications Commission is correct, the end result is that The Communications Act of 1934, as amended, authorizes the Commission to regulate and control all sources of information and entertainment. As the Commission itself stated in 1959, when it then declined to assume jurisdiction over CATV systems:

"In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration." *In re, Inquiry Into the Impact of Community Antenna Systems, etc. On the Orderly Development of Television Broadcasting,* 26 F.C.C. 403, 431-432 (1959).[15]

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[15] The Commission's admitted lack of jurisdiction over CATV systems was judicially noticed by the United States District Court for the District of Idaho (Southern Division) in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (1962), *reversed on other grounds,* 335 F. 2d 348 (C.C.A. 9th, 1964), wherein, at page 55, the Court stated as follows:

"As indicated in this Court's previous discussion of the history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 U.S.C. 153(a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services . . .

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It is indeed absurd to even suggest that the Congress would place such power and authority in the hands of an administrative agency, which by its very nature is divorced and isolated, in terms of its responsibilities, from the electorate.

That Congress did not intend to and did not grant the Federal Communications Commission such "sweeping" and "comprehensive" power is evident from the reaction generated by a recent request of the Commission for a "retroactive" amendment to The Communications Act which would give it statutory authority over CATV systems. (See, H.R. Rep. No. 1635, 89th Cong., 2d Sess., submitted June 17, 1966, to accompany H.R. 13286). The minority views on the Bill (*Id.* at 23-25) were expressed as follows:

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15 (continued)

> "So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not now have jurisdiction over community antenna services."

Earlier, on September 8, 1959, Senator Pastore, from the Committee on Interstate and Foreign Commerce, reported to the United States Senate Bill S. 2653 entitled, "A Bill to amend the Communications Act of 1934 *to establish jurisdiction in the Federal Communications Commission* over community antenna systems." (Emphasis supplied) Calendar No. 950, S. 2653 (Rep. No. 923), 86th Cong., 1st Sess. In 1960, following debate on the floor of the Senate, this Bill was recommitted to the Committee. 106 Cong. Rec. 10326, 10344, 10407, 10520, and 10546.

If, as is specifically stated, the purpose of S. 2653 was to establish the Commission's jurisdiction over CATV, then its failure of passage of necessity left the Commission where it was (and where it is today), i.e., without jurisdiction.

"H.R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set — to name a few of the flaws.

"Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the limited frequencies available in the spectrum. Regulation was for the sole purpose of properly

policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

"The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

"H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain

economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

"A CATV system is a wired communications system and does not use the spectrum of public domain for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

* * * * *

"If the Congress passes H.R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals — jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

"It is to be noted that the Federal Communications Commission, although previously denying

> jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly – an entirely new concept in governmental regulation."

Respondents recognize that the United States Court of Appeals for the District of Columbia Circuit has recently held that the Commission does have jurisdiction to regulate CATV systems which do not employ microwave transmission, basing its decision on the broad ground that the enlargement by CATV systems of the signal range of licensee stations reacts ". . . to the potential detriment of the entire regulatory scheme." See, *Buckeye Cablevision, Inc. v. Federal Communications Commission,* No. 20274, United States Court of Appeals for the District of Columbia Circuit (June 30, 1967).

For the reasons set forth above in this brief, Respondents submit that the *Buckeye* decision is wrong. Rather than decide the points raised by the appellant in that proceeding, it does nothing more than add a judicial gloss to the Commission's own opinion. Like the Commission's opinion, it patently fails to come to grips with the issues or with the important fundamental legal and jurisdictional questions involved.

The Commission and the District of Columbia Circuit Court have bootstrapped themselves

> ". . . into an assertion of jurisdiction over all CATVs without ever squarely defining, analyzing and considering the issues, the legal basis of . . . jurisdiction and the limitations of the jurisdiction asserted. By this intellectual bootstrapping operation . . . [they have] moved from a specific statutory authority to license interstate radio transmissions to the assertion of . . . power to regulate and prohibit the intrastate transmission by wire of programs originating, broadcast and received within the same state. As authority . . . [they rely] on a Supreme Court opinion upholding regulation of interstate radio transmission by licensing because of its 'unique characteristic' and blandly assert . . . that . . . the same principles should . . . apply to communication that is not by radio and that has entirely different characteristics . . . ." *Dissenting Opinion of Commissioner Lee Loevinger On Reconsideration of CATV Rules,* Docket Nos. 14895, 15233 and 15971, 8 Pike & Fischer R.R. 2d 1698, 1701 (1967) (A. 135).

The important jurisdictional questions now posed before this Court are deserving of much more than the treatment accorded them by the District of Columbia Court in *Buckeye.* Particularly disturbing is that court's disposition of this Court's *Carroll* precedent on the theory that the holding was based largely on the Commission's then lack of authority to issue cease and desist orders. Respondents respectfully submit that this Court's decision in *Carroll* was not at all based on or dependent upon the Commission's authority (or lack of authority) to issue cease and desist orders. It could not be so predicated in view of the fact that this Court understood, and so stated, that the Commission's then pending request for

statutory authority ". . . did not go beyond asking for power to issue a cease and desist order *against a licensee.*" *Regents of the University System of Georgia v. Carroll, supra*, at 602, 94 L. Ed. at 375. (Emphasis supplied)

Section 312(b) of The Communications Act, as later amended, did give the Commission cease and desist authority but (insofar as pertinent here) only with respect to violations of, or failures to observe, license terms or conditions and rules or regulations *otherwise authorized by the Act.* The legislation in no way changed the extent of authority granted the Commission by Section 303(r) or similar provisions of the Act on which the Commission relies in support of its asserted CATV jurisdiction. As the Committee of Conference on the Section 312(b) amendment pointedly explained, ". . . the authority to issue cease and desist orders . . . (gives) the Commission a means by which it can secure compliance with the law and regulations *by licensees . . .*" *Conference Report on Communications Act Amendments,* 1952, H.R. Rep. No. 2426, 82d Cong., 2d Sess., submitted July 1, 1952, to accompany S. 658, 1 Pike & Fischer R.R. 10:341, 10:437. (Emphasis supplied).[16]

The question here is not, as the *Buckeye* decision would have it appear, whether a regulatory scheme, established (rightly or wrongly) in connection with the licensing of radio transmitters, would suffer if not extended to encompass the dissemination of information by wire. The question is

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[16] Admittedly, the Commission may use cease and desist orders in some non-licensing areas but only when it has been *specifically* authorized to act therein, *i.e.*, to enforce Section 303(s) of the Act requiring that all television sets shipped in interstate commerce be capable of receiving all television channels, VHF and UHF.

whether the Federal Communications Commission possesses the required statutory authority to make the extension and this Court, dealing specifically with that question in *Carroll*, has decided that the Commission does not possess such authority.

In *Buckeye*, the lower court found that the Commission's authority to regulate CATV systems basically flowed from Section 1 of The Communications Act (a theory *not* urged by Petitioners before this Court) which the court stated ". . . *directs* the Commission to provide 'a rapid, efficient, Nation-wide and world-wide wire and communications service . . . " (Emphasis supplied) The simple fact of the matter is that Section 1 of The Communications Act directs nothing of the kind. Section 1 merely sets forth the purpose for which the Federal Communications Commission was established, *i.e.*, to regulate ". . . interstate and foreign commerce in communication by wire and radio so as to make available, *so far as possible*, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service . . . ." (Emphasis supplied) Respondents respectfully submit that the United States Court of Appeals for the District of Columbia Circuit has, in effect, erroneously rewritten The Communications Act. It has done this in order to support a decision upholding a claim of jurisdiction which it (the court) believed the Commission should have, instead of the jurisdiction which Congress, the responsible branch of the government, saw fit to give it. The court below (the Ninth Circuit) properly interpreted the will of Congress and its decision should be affirmed.

B. The Control of Competition Is Beyond the Power of the Commission

The purpose of the CATV Rules is clear and unmistakable — it is to prevent economic competition to television stations. The Commission's Second Report and Order frankly admits that the purpose of the Rules is to prevent the possible demise of UHF television stations because of economic competition.[17] It is submitted, therefore, that the Commission's assertion of jurisdiction cannot be upheld, unless it can be found that Congress specifically conferred this power upon the Commission – *i.e.*, the power to protect broadcast stations from competition, both from other stations and from other businesses.

There can be no real question but that the paramount public policy of the United States, as to the relationship of government to business, is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the federal level can be made only by Congress. Tampering with free competitive business by government, to the extent of eliminating competition, places that business, at least, in a public utility category, if not in a category subject to even more governmental supervision, direction

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[17] *Second Report and Order, supra* at 737, 774, 6 Pike & Fischer, R.R. 2d at 1735, 1777 (A. 13, 50). Later, however, in a separate proceeding involving Respondents, the Commission emphasized that the principal question was whether the unlimited expansion of service by CATV systems ". . . will have such an impact upon local television service, VHF as well as UHF, as to adversely affect the public interest and, if so, the remedial steps which must be taken in the public interest to prevent the demise or impairment of local television service . . . ." In re *Midwest Television, Inc. (KFMB-TV*, 5 F.C.C. 2d 686, 688, 8 Pike & Fischer, R.R. 2d 1075, 1078 (1966).

and control than attaches to public utilities. In *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231, 248, 249, 95 L. Ed. 239, 250, 251 (1951), this Court succinctly stated this principle.

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "

Moreover, this Court has held that one who seeks to exclude a broadcast station from a market thereby attempts to monopolize commerce contrary to this national economic policy. *Lorain Journal Co. v. United States,* 342 U.S. 143, 96 L. Ed. 162 (1951).

It is not disputed, however, that this national policy favoring competition can be, and has been modified by Congressional action in authorizing the elimination, or at least the control, of competition in regulated industries. Since the antitrust laws, which promulgate the national policy in favor of competition, were on the books before most regulatory agencies were created, it is clear that the later statutes were enacted with Congressional knowledge of the existing and controlling economic national policy. In *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 218, 15 L. Ed. 2d 709, 713 (1966), this Court adopted a simple and clear principle for resolving any conflict that might arise:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot

> lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry."

Following this principle, for example, the Court has determined that the Federal Aviation Act of 1958, 72 STAT. 737, as amended, 49 U.S.C. §§1301 *et seq.*, has given the Civil Aeronautics Board the power to control competition through the authorization of mergers. *Pan American World Airways v. United States*, 371 U.S. 296, 9 L. Ed. 2d 325 (1963). The Second Circuit followed this ruling in *Trans World Airlines v. Hughes*, 332 F. 2d 602, 606 (1964), *cert. granted*, 379 U.S. 912 (1964), *cert. dismissed*, 380 U.S. 248 (1965), when it stated as follows:

> "The proposition has so often been stated that it has become hornbook law that immunity from the operation of the antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. Yet Congress may effect such a design *through explicit enactment of an immunizing provision*, and Congress has done so on occasion." (Emphasis supplied, citation and footnote omitted)

On the other hand, it has been held that the Security Exchange Act of 1934, 48 STAT. 881, as amended, 15 U.S.C. §§ 78a *et seq.*, and the Merchant Marine Act of 1936, 49 STAT. 1985, as amended, 46 U.S.C. §§1101 *et seq.* do not provide exemptions from the anti-monopoly policy adopted by Congress. *Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L. Ed. 389 (1963); *Pacific Far East Line v. Federal*

Maritime Board, 107 U.S. App. D.C. 155, 275 F. 2d 184 (1960), *cert. denied,* 363 U.S. 827, 4 L. Ed. 2d 1523 (1960).

With these basic principles in mind, an examination of The Communications Act of 1934, as amended, is appropriate. It is unnecessary to demonstrate by reference to legislative history, and the circumstances which led to their original enactment, that the principal objectives of the Radio Act of 1927, and of Title III of The Communications Act of 1934, were the regulation of the technical aspects of radio frequency allocation, to provide relief from the interference chaos that had developed prior to 1926, to establish a system for the fair, equitable and efficient distribution of such frequencies in the future, and to regulate ownership and control of stations so as to preserve competition and prevent monopoly in radio communications.

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * *

". . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment and financial ability to make good use of the assigned channel.

* * *

". . . Congress intended to leave competition in the business of broadcasting where it found it,

> to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." (Footnotes omitted) *Federal Communications Commission v. Sanders Bros. Radio Station, supra* at 474-475, 84 L. Ed. at 873-874.[18]

If, as this Court has said, Congress intended "to leave competition in the business of broadcasting where it found it" and to permit a broadcaster "to survive or succumb according to his ability to make his programs attractive to the public," it obviously intended that the broadcaster was not to be protected against competition.

All free competitive businesses, of course, are subject to some limitations and restrictions, both as to location and product or service, but the restrictions and limitations are such that they do not change the free competitive nature of the business. Otherwise, the business ceases to be freely competitive and becomes a public utility subject to regulation.

Obviously, as this Court made clear in the *Sanders* decision, Congress did not intend to subject the business of broadcasting to public utility regulation, or to anything similar thereto. In a few instances, Title III of The Communications Act (and its predecessor the Radio Act of 1927, from which the Commission derives its authority) singles out broadcasting

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[18] The holding of this Court in *Sanders* relates solely to two points: First, that economic injury provides standing to appeal under The Communications Act; and second, that economic injury to an existing station is not a factor to be considered by the Commission in granting licenses. The quoted portion of the opinion is clearly directly related to and a pertinent part of this latter point.

for special legislative and regulatory treatment, but otherwise, the Commission's statutory power, authority, and responsibility in connection with the licensing of radio stations for broadcast use is no different than its power, authority, and responsibility in connection with the licensing of the many other classes and types of radio stations subject to the Commission's jurisdiction.

That Congress did not intend such a result is best illustrated (except perhaps by the language of the Act, itself) by the proceedings in the United States Senate in connection with S. 1333. S. 1333, among other things, proposed to amend Section 307(b)[19] of The Communications Act of 1934 to read as follows:

> "In considering applications for licenses, and modifications thereof, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same, *giving effect in each such instance to the needs and requirements thereof.*" (Emphasis supplied) *Hearings before Subcommittee of the*

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[19] Section 307(b), then, as now, reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. (1947), p. 4.

The obvious purpose of the foregoing amendment was to eliminate the clause "when and insofar as there is demand for the same" from Section 307(b) and to substitute a general requirement that the Commission give effect to the "needs and requirements" of communities where there was no competitive application from another community for the frequency involved. Testifying in opposition to this amendment, the then chairman of the Federal Communications Commission, after explaining that the amendment ". . . would delete the requirement as to demand and instead require the Commission to give effect to the needs and requirements of the various communities . . .", pointed out that if the amendment merely required ". . . the Commission to consider the needs and requirements of communities when the issue before the Commission is a question of which of two competing applications from different communities should be granted . . .", it would not be objectionable, since Section 307(b) "as it now stands" requires the same consideration. The change would be objectionable, he testified, if the amendment would require the Commission to consider the "needs and requirements" in the absence of a ". . . competitive application from another community for that frequency." (*Id.* at 33) He then stated:

> "Under the normal operation of the competitive system either you have free competition, or you do not. Either you have free competition, or you have some restriction on free competition.
>
> "Now, if this section is adopted as written, it is certainly going to be urged that it imposes very

definite restrictions on free competition; so much so that I am afraid it is going to be successfully argued that if it were enacted, it would throw the competitive system out the window.

"We do not want to do that, and therefore I think that if we are to have some limit on free competition, we have got to have some compass to guide us and tell us exactly what the limits are. I think we have got to work out the formula here in these sessions." (*Id.* at 40)

The proposed amendment was not adopted and thereafter the United States Court of Appeals for the District of Columbia Circuit acknowledged that the principle of free competition continued to govern the Federal Government's relationship to the broadcast industry:

"Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service . . . . " (Emphasis supplied) *Easton*

Publishing Co. v. Federal Communications Commission, 85 U.S. App. D.C. 33, 35, 175 F. 2d 344, 346 (1949).

Both the courts and the Commission, itself, have concluded that Title III of The Communications Act confers no immunity from the operation of the antitrust laws and must be administered in harmony with the policy established thereby. As early as 1943, three years after *Sanders,* this Court quoted with approval the Commission's statement that it was required to " '. . . administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve . . . .' " *National Broadcasting Company v. United States,* 319 U.S. 190, 223, 87 L. Ed. 1344, 1366 (1943).

In 1953, this Court had occasion to consider the effect of the national policy favoring competition upon the powers of the Commission insofar as Title II was concerned. In *Federal Communications Commission v. RCA Communications,* 346 U.S. 86, 97 L. Ed. 1470 (1953), it held that the Commission erred in relying solely upon the national policy of competition to support an award of duplicate facilities to a common carrier. The Court specifically pointed out there were limitations upon this national policy and made it clear that the common carrier field was one in which such an exception has been made because there may be valid reasons to limit competition. *Id.* at 91-92, 97 L. Ed. at 1476, 1477.

Finally, in 1959, this Court specifically overruled the contention that Title III of The Communications Act of 1934, as amended, gave the Commission authority to pass upon antitrust questions in the broadcast industry. In this case, *United States v. Radio Corp. of America,* 358 U.S. 334, 348-350, 3 L. Ed. 2d 354, 364-365 (1959), the Court held:

> "While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. Radio broadcasters, including television broadcasters, see *Allen B. Dumont Laboratories, Inc. v. Carroll* (CA 3 Pa), 184 F. 2d 153, are not included in the definition of common carriers in §3(h) of the Communications Act, 47 USC §153(h), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, 47 USC §§ 201-222, do not apply. Television broadcasters remain free to set their own advertising rates. [Citing *Federal Communications Com. v. Sanders Bros. Radio Station, supra.*]
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> * * *
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> "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (Footnotes and quotation omitted)

The Court went on to state that the Commission may, when determining the "public interest, convenience and necessity" consider the federal antitrust policy. Thus, in a particular case, "antitrust considerations alone" might keep the statutory standard from being met and serve as grounds for a dismissal. *Id.* at 351, 3 L. Ed. 2d 366. But the Court did not say that the policy favoring competition and antitrust considerations could be ignored or overruled.

The Commission formerly held that it had no power to consider the effect of competition and that broadcasting is a free, competitive business. Three months after the *Sanders* decision, the Commission had occasion to reaffirm this conviction in *Presque Isle Broadcasting Co.*, 8 F.C.C. 3, 9, 10 (1940):

> "It is inescapable that the intent of Congress would be completely nullified, and the Supreme Court's declaration concerning the desirable effects of competition would be rendered entirely meaningless if the Commission were required to deny a new station to enter the field merely because it would adversely affect the ability of an existing station to continue to serve the public. It is a direct contradiction of the proposition that free competition is the basic principle of the American system of broadcasting to contend that the Commission is under a duty to consider the effect which competition may have upon the ability of an existing licensee to continue to serve the public. It is implicit in the idea of free competition that public interest cannot possibly be adversely affected by the failure of an existing station to survive due to increased competition, because this result cannot follow unless the new station's competitive efforts enable it to render a superior public service. In other words, under the statute, competition which an applicant has to face may be important because his financial qualifications may depend upon it; but the effect of competition with which an existing licensee is confronted as a result of a new station need not be considered by the Commission under the statute because whatever that effect may

be, it is only the end product which a system of free enterprise is designed to produce."

Again, in 1957, the Commission specifically held that it had no power to consider the adverse effects of legal competition upon service to the public. *Southeastern Enterprises (WCLE)*, 22 F.C.C. 605, 614-615, 13 Pike & Fischer, R.R. 139, 149-150 (1957). In that case, the Commission carefully pointed out the difference between its regulatory powers under Title II and Title III in the following manner:[20]

"40. If the protestant's allegations are true and the public is injured in this case, it must persuade Congress to modify the law and provide for protection against competition in such cases as the protestant's. Until Congress gives us the power to permit something less than free competition in the industry, we have no power to save either the public or the protestant from certain of competition's uncomfortable effects.

"41. This must be our disposition with respect to protestant's request for relief from competition because we cannot assume that Congress intended for us to prevent free competition in certain instances and yet not impose regulatory substitutes in such instances. Congress has not given us the power, as in the case of the carriers that we

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[20] But see, *The Voice of Cullman*, 14 F.C.C. 770, 6 Pike & Fischer, R.R. 164 (1950); *Kaiser Hawaiian Village Radio, Inc.*, 22 F.C.C. 751, 13 Pike & Fischer, R.R. 849 (1957); *Iredell Broadcasting Co. (WDBM)*, 23 F.C.C. 79, 13 Pike & Fischer, R.R. 996 (1957).

> regulate under Title II, to regulate the business of a broadcast licensee. Section 3(h) of the Communications Act of 1934, as amended; Sanders case, 309 U.S. 470 (1940). The extent to which we would get into regulation of the business aspects of a broadcast licensee is clear from a consideration of what we must do to properly determine Issues 1 to 4."

This statement represented the position of the Commission until 1958, when the United States Court of Appeals for the District of Columbia Circuit held that the Commission *must* consider the effect of economic competition upon the public interest in awarding a license to a new broadcast station when it would be in competition with an existing station in the same community. The doctrine was promulgated over the objections of the Commission in *Carroll Broadcasting Co. v. Federal Communications Commission,* 103 U.S. App. D.C. 346, 349, 258 F. 2d 440, 443 (1958). In that case, the Circuit Court held that under the following *dictum* in *Sanders, supra* at 475-476, 84 L. Ed. at 874-875, the Commission had the power and responsibility to determine whether the effect of an award of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest:

> "This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both

> stations – the existing and the proposed – will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

Today, this doctrine is being urged as justification for a gigantic leap toward government control – that the public interest requires the protection of broadcasting from economic competition from a non-licensed business – a position which the Commission once characterized as absurd.[21] Thus, Title III has come full circle – the public interest, which first was held to be the same as that expressed in the antitrust laws, has now come to be the exact opposite of the public interest protected by these same laws – and all without a single statutory change by Congress.

In reaching this determination, the original purpose of Title III has been forgotten as has this Court's warning that the criterion "public convenience, interest and necessity" ". . . is not to be interpreted as setting up a standard so indefinite as to confer unlimited power." *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., supra* at 285, 77 L. Ed. at 1178. The clear meaning of the Act, in providing the Commission with specific powers in Title II and in withholding similar powers in Title III, is that Congress intended to ". . . render the more general provisions of the antitrust laws . . . " inapplicable to common carriers but to retain their applicability to broadcasting.

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[21] *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-432, 18 Pike & Fischer, R.R. 1573, 1603 (1959).

It appears inconceivable that, once it has been determined that the criminal and civil provisions of the antitrust laws and the economic policy of competition are applicable to broadcast licensees, it can be held that the Commission has the power to limit or control competition. Under cover of the CATV rules, a dominant network television station in San Diego has been leading a fight to limit or eliminate CATV competition in that community. This is a situation analogous to that condemned by the Commission and the Court in the *Lorain Journal* case. In the *National Broadcasting Company* case, the Court held that Commission approval of a merger did not protect the licensees involved from the antitrust consequences of their acts.

The anamolous position of the Government is emphasized by the positions the Department of Justice has taken in various cases involving CATV. In the United States Court of Appeals for the District of Columbia Circuit, the Department opposed the merger of International Telephone and Telegraph Corporation and American Broadcasting Companies, Inc. In its brief, it accepted the principle that under The Communications Act ". . . the field of broadcasting is one of free competition. . ." citing *Sanders, supra*;[22] and that the merger would prevent ITT from developing CATV systems ". . . which would offer services competitive with the existing conventional broadcasting structure. . . ."[23] In this regard, the brief states:

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[22] Brief for Department of Justice, Case No. 21147, United States Court of Appeals for the District of Columbia Circuit, p. 17.

[23] *Id.* at p. 49.

> "CATV and the closely-related concept of a pay-TV cable system are among the most important potential developments which would multiply the channels of broadcast transmission, and provide competitive alternatives to the existing structure of broadcasting. If local CATV systems bring in non-network programs from distant areas or originate their own programming, they will offer significant competition to the local, network-affiliated broadcasting stations. Moreover, development of economic methods of interconnecting local CATV systems into regional or national CATV grids would have an especially significant competitive impact. It would facilitate the entry of new companies into the large-scale production and distribution of programming in a manner similar to and competitive with conventional network television."[24]

However, the Department must try to harmonize this argument for CATV competition with the fact that such a principle runs directly counter to the Commission's present policy under the new CATV rules. To do so, it argues that antitrust policy is satisfied by the existence of persons who disagree with a Government policy against competition.[25] It is apparent that the Department is hiding its head in the sand. Any realistic appraisal would confirm that the Commission's rules are designed solely to prohibit CATV competition in the top 100 markets. The fact that theoretical waivers are possible, which provisions were incorporated primarily for legal purposes,

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[24] *Id.* at p. 61.

[25] *Id.* at p. 68.

cannot obscure this fact. Moreover, the time-consuming device of exhausting the administrative remedy will eliminate the possibility of competition for years to come. Thus, Commission regulation can only destroy the very result which Justice contends is required by national policy and the public interest.[26]

The Department's recent position that copyright law provisions apply to CATV operations[27] is much more realistic although still inconsistent with the Government's position in this case. The fact is that once a CATV system is required to pay a fair cost of operation, *i.e.*, it is equally responsible for a reasonable license fee for presenting copyrighted material, the Commission's charge of "unfair competition" will cease to exist, and with it the need of Commission regulation. Moreover, no responsible CATV owner really contends that CATV is "free" as is off-the-air broadcasting, so the imposition of copyright fees will not change the status of CATV. The viewer is required to pay a reasonable subscription fee to receive CATV service. But this fee must include *all* the costs of doing business and cannot be artificially low because of a Government subsidy. When both broadcasting and CATV systems are able to furnish their products without either having an "unfair" economic advantage, the public profits. Thus, if "free" television service can offer programming that attracts viewers, it has nothing to fear from the CATV operator who pays a "fair"

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[26] It is reported that Justice is looking into the anti-competitive effects of combinations of TV stations and CATV. *Broadcasting*, Vol. 74, p. 5 (January 29, 1968).

[27] Memorandum for the United States as *Amicus Curiae*, *Fortnightly Corporation v. United Artists Television, Inc.*, Case No. 618.

price for his product. The failure of "free" television to present attractive programming, *i.e.*, provide a better mousetrap, is no justification for suppression of competition. Only if "free" television has to compete at an economic disadvantage, would it be justified in running to the Government for economic protection. Thus, the adoption of the Department of Justice's position in the *Fortnightly* case would eliminate any contention of a need for economic protection from CATV. Moreover, it would allow Congress an opportunity to give the Commission, by appropriate statutory amendment, the express authority required, if competition in broadcasting is to be eliminated.

The present CATV rules illustrate the danger arising from the inevitable extension of the lower court's ruling in *Carroll Broadcasting Co.* Today, the public's only control over broadcast content is its ability to turn to another station. Consequently, the American citizen has exercised his inherent right and ingenuity to secure as many television services as possible as sources of entertainment and information. If that right and ingenuity are limited, eliminated or circumscribed by a federal agency in Washington in order to give local television stations freedom from competition, the public, alone, will suffer. The Commission admittedly has no control over program content, the number and amount of commercials and the rates a broadcaster may charge. Congress specifically withheld this power and gave the public the right of competition as protection – *i.e.*, the right to turn to another channel. To maintain and enforce this right, the public is willing to pay for an added service which can only be furnished by CATV systems. This right of choice – the right to benefit from competition – is something only Congress can take from the American public. Moreover, if Congress takes away this right, it will have to substitute controls in Title III just as it did in Title II. Until

Congress affirmatively and explicitly makes known its intent in this vital policy field, neither the Commission nor the courts can infer that broadcasting was intended to be half-free and half-controlled so that the public is to receive the worst of each system.

It is submitted that the *dictum* in *Sanders*, as interpreted by the United States Court of Appeals for the District of Columbia Circuit, is clearly inconsistent with the holding in that case and this Court must decide either (1) to overrule *Carroll Broadcasting Co.* and determine that broadcasting is a freely competitive industry and the control of competition is beyond the authority of the Commission unless expressly conferred by Congress; or (2) overrule the holding in *Sanders* and determine that the effect of competition on the public must be considered by the Commission in broadcast matters, and consequently that broadcasting is not a freely competitive business. However, even an affirmance of the *Carroll Broadcasting Co.* decision should provide that the Commission's power to consider competition is limited to its function of licensing other broadcasting stations. Otherwise, the Commission could just as logically assume that the public interest requires that every community be guaranteed that a certain number of UHF stations will be able to exist and that the Commission is obligated to suppress or control any economic competition that might threaten the economic well-being of these stations, if it involves interstate communication by wire. It might just as logically and legally limit the amount and kind of news in newspapers which is received from the press services (these services use wire and radio facilities and are in competition with radio and television).[28] Moreover, only a short

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[28] The issue of freedom of speech was raised before the lower court, but not decided in the decision on review. It is clear, however,

(continued)

extension of the principle would allow the Commission to control the amount and kinds of full-length features that are shown in local theatres (these films are shipped in interstate commerce and compete with films on television), and the height and design of receiving antennas that may be erected by local citizens (for example, in San Diego, California, the receipt of off-the-air Los Angeles signals obviously fragments the local station's audience).

For these reasons, it is submitted that the elimination of CATV compeititon to broadcast stations is not one of the purposes of The Communications Act of 1934, as amended. It follows, therefore, that the Commission's adoption of the CATV rules, which are designed for this purpose and this purpose alone, is clearly beyond the power of that agency.

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28 (continued)
that a grave constitutional question is raised by the Commission's ruling that it can limit the right of an American citizen to view the signal of the station of his choice which is or can be made available on CATV. It is apparent, therefore, that the danger sought to be avoided by the Commission, albeit not a "clear and present danger", is the danger that local television stations will be faced with economic competition. While this danger might, and probably does, justify the imposition of reasonable copyright fees and perhaps Congressional action to afford other property right protection for television broadcast stations, it certainly does not justify restriction of the freedom of speech guaranteed by the First Amendment. *Weaver v. Jordan*, 64 Cal. App. 2d 235, 411 P. 2d 289 (Calif. 1966), *cert. denied*, 385 U.S. 844, 17 L. Ed. 2d 75 (1966). See, Comment, *Refusal of Radio and Television Licenses on Economic Grounds* (1960), 46 Va. L. Rev. 1391; Wall, *Program Evaluation by the Federal Communications Commission, An Unconstitutional Abridgment of Free Speech* (1951), 40 Georgetown L.J. 1.

II.

THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ISSUE A RESTRAINING ORDER IN ORDER TO MAINTAIN THE *STATUS QUO* PENDING THE OUTCOME OF A HEARING

Petitioners' theory of the Commission's authority to issue the temporary restraining order involved here assumes the basic authority to regulate CATV in the first instance. Thus, Petitioner, Midwest, argues that the ". . . Commission's grant of an interim stay is properly grounded in its express power to issue orders and prescribe restrictions requisite to accomplish its statutory responsibilities." As explained above, in Point I of this brief, the Federal Communications Commission has no responsibilities – statutory or otherwise, and no power or authority, with respect to CATV. It follows, of course, that Congress did not give the Commission the useless power to enforce – by temporary restraining orders or otherwise, rules and policies which it was not empowered to adopt. This is the short answer to Petitioners' contention that the Federal Communications Commission is empowered by The Communications Act to issue a temporary restraining order such as involved here. Respondents submit that the converse argument is much more logical, *i.e.*, since the Congress provided no enforcement procedures for CATV regulatory actions, it obviously did not intend that the Commission have the authority to regulate CATV.

But even if the Commission does have general jurisdiction to regulate non-microwave CATV systems (an *assumption* which must be made if the second question presented by this case is to be reached), it clearly does not have the added authority to stay legal activities pending a hearing to determine whether those activities should be permanently enjoined.

Petitioners' position to the contrary is based on the same Sections 4(i) and 303(r) of The Communications Act on which they rely in support of their jurisdictional theory. But if those sections provide such authority, the perfectly logical question arises as to why it was necessary to obtain specific statutory authority before the Commission could issue cease and desist orders which are now provided for in Section 312(b) of the Act. The court below was quite correct when it concluded as follows:

> ". . . If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power."

The pointed answer to Petitioners' contention is that the specific delegation of authority contained in Section 312(b) of the Act negates the existence of any general injunctive power under Sections 4(i) and 303(r). The only provision in The Communications Act allowing the Commission to take action without the procedural safeguard of a hearing is contained in Section 204 (Title II). That section authorizes the Commission to summarily suspend newly filed rates of

common carriers without a hearing but precisely confines the effectiveness of such a suspension to a period of no more than three months. Needless to say, this provision also would be unnecessary if Section 4(i) gave the Commission the authority it now claims.

Petitioners' theory of the Commission's authority to issue temporary stays reduces to the absurdity that the Commission has greater power to deal with so-called broad and implied responsibilities than it has to deal with responsibilities which the Congress has specifically defined. The Communications Act spells out in detail the areas of radio (and broadcast) regulation with which the Commission should be concerned, and just as specifically defines its enforcement powers with respect to those responsibilities. On the other hand, there is no Congressional specification of Commission responsibility for the regulation of CATV systems and (as might be expected) no definition of enforcement measures that relate to the regulation and operation of CATV systems. Nevertheless, Petitioners argue that the Commission has greater enforcement powers with respect to CATV regulation than it has with respect to radio regulation.

If a broadcast licensee should decide to flout specific statutory and administrative requirements, *i.e.*, to support a political candidate of his own choosing without providing equal time for the opposing candidate as required by the Act; to espouse one side of a controversial question without airing opposing views as required by the Commission's so-called "Fairness Doctrine"; to operate a television station without a license; or to engage in any number of other prohibited activities, the Commission's only course of action, in order to eliminate the practice, would be one of the following: Issue a cease and desist order pursuant to Section 312(b) of the Act; institute a license revocation proceeding pursuant to

Section 312(a); deny the *offender's* application for renewal of license pursuant to Section 309; or, as it might be required to do even if it first followed one of the foregoing procedural avenues, seek the assistance of the courts as provided by Sections 401, 501 or 502 of the Act.

Regardless of which of the foregoing enforcement procedures the Commission followed in connection with a radio broadcast violation, the violator would be entitled to a full evidentiary hearing prior to legal enforcement of the sanction or penalty involved. On the other hand, Petitioners argue that the operation of CATV systems, such as those of Respondents, may be summarily restrained even though the systems admittedly are being operated in full compliance with all pertinent federal legal and administrative requirements and, in a manner specifically authorized and required by local authorities.

It is submitted that it is not logical to contend, as Petitioners do, that the Congress, by complete silence, has given the Commission greater power to enforce non-specified CATV responsibilities than it provided, in extensive detail to enforce the specific mandates for radio and broadcast regulation.

In the absence of pertinent court cases interpreting The Communications Act, Petitioners are forced to rely upon two lower court cases interpreting other statutes to support their contention that the Federal Communications Commission has the power to maintain the *status quo* pending the conclusion of an *ad hoc* proceeding to determine if a permanent stay should be issued. It is clear, however, that neither of these cases support Petitioners' contention because of material differences in law and fact.

First and foremost, this Court has warned, in another context, that ". . . federal agencies are not fungibles . . . – Congress has treated the matter with attention to the

particular statutory scheme and agency." *International Union, United Automobile, Aerospace & Agriculture Implement Workers, etc. v. Scofield*, 382 U.S. 205, 15 L. Ed. 2d 272 (1965).

This warning is particularly pertinent in regard to comparisons of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C.A. §§717 *et seq.* with Title III of The Communications Act. For this reason, Petitioners' reliance on *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F. 2d 572 (C.C.A. 10th, 1961), *cert. denied*, 368 U.S. 976 (1962), is completely misplaced. In that case, the lower court merely affirmed an agency decision designed to protect its administrative process. The agency dismissed a second filing of rate change while a prior rate change was being processed. Such a rule is analogous to the Commission's rule prohibiting the filing of multiple applications[29] and requires no special delegation of authority from Congress. The fact that Section 16 of the Natural Gas Act, 15 U.S.C.A. §717o (1963) is "strikingly like" the provisions of Section 4(i) of The Communications Act, can lead only to the conclusion that the Commission also has sufficient authority to adopt necessary

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29 "§1.520 Multiple applications.

Where there is one application for new or additional facilities pending, no other application for new or additional facilities, for a station of the same class to serve the same community, may be filed by the same applicant, or his successor or assignee, or on behalf or for the benefit of the original parties in interest. Multiple applications may not be filed simultaneously." (47 CFR 1.520)

procedural rules. Moreover, the facts in *Amerada* are completely different from those involved when an agency seeks to stay a lawful business pending a hearing to determine whether the public interest requires the issuance of a permanent stay. The former facts affect agency procedure alone; the latter facts affect substantive rights of other parties.

The second case relied upon by Petitioners is *R. A. Holman & Co., Inc. v. Securities and Exchange Commission*, 112 U.S. App. D.C. 43, 299 F. 2d 127 (1962), *cert. denied*, 370 U.S. 911 (1962). Again, both the statutory language and facts are different. To begin with, appellant in *Holman* did not challenge the statutory power of the Commission and the court did not have occasion to pass upon the issue. The reason for the absence of this challenge is self-evident. Section 3(b) of the Securities Act of 1933, 48 Stat. 75 (1933), as amended, 15 U.S.C.A. §77c(b) (1963), provides that the Commission may from time to time "by its rules and regulations" add any class of securities to the exempt list, if certain conditions are met. Obviously, such a grant of statutory authority carries with it the corollary power to remove securities from the exempt list when conditions for exemption are no longer present.

In addition, the facts in *Holman* and the instant case are completely different. Moreover, in *Holman*, the Court found that Congress was aware of the Commission's Rules and saw nothing therein which conflicted with the statutory purpose. However, these differences merely point up Petitioners'

fallacy in relying upon an expression of Congressional intent in one statute as evidence of the Congressional intent in enacting a different administrative statute.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February, 1968.

APPENDIX

THE COMMUNICATIONS ACT OF 1934, AS AMENDED, 66 STAT. 718, 47 U.S.C.A. 151, *et seq.*

Sec. 309. Application for license—Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor,

specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission. As amended May 14, 1964, Pub.L. 88-306, 78 Stat. 193; May 14, 1964, Pub.L. 88-307, 78 Stat. 194.

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Sec. 312. Administrative sanctions—Revocation of station license or construction permit

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of Title 18.

Sec. 401. Enforcement of chapter and orders of Commission; jurisdiction

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order

by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission, it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of sections 28 and 29 of Title 15, section 345(1) of Title 28, and sections 44 and 45 of Title 49 shall be held to apply to any suit in equity arising under sections 201-222 of this title, wherein the United States is complainant. June 19, 1934, c. 652, Title IV, § 401, 48 Stat. 1092; June 25, 1948, c. 646, § 1, 62 Stat. 909.

Sec. 501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by

imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both. June 19, 1934, c. 652, Title V, §501, 48 Stat. 1100; Mar. 23, 1954, c. 104, 68 Stat. 30;

Sec. 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs. June 19, 1934, c. 652, Title V, §502, 48 Stat. 1100.